Supreme Court, U.S.
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No. ——

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1998

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, INC.,
*Petitioner,*

v.

DENNIS SCHOONOVER,
*Respondent.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

EDWARD C. KAMINSKI
AMER CUNNINGHAM BRENNAN CO., L.P.A.
Sixth Floor, Key Building
159 South Main Street
Akron, OH 44308-1322
(330) 762-2411
*Attorney for Petitioner Consolidated Freightways Corporation of Delaware, Inc.*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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## QUESTIONS PRESENTED

In this hybrid § 301/duty of fair representation case tried to a jury:

I. Did the Sixth Circuit's decision, that there was sufficient evidence of Teamster Local 24's alleged breach of its duty of fair representation to submit the question to the jury, differ from the Court's decisions on the "proper standard of union liability"?

II. Is the Sixth Circuit's decision (which is in conflict with the decisions of the Seventh and Eleventh Circuits) that the accrual of the limitation period for filing a duty of fair representation claim is the date when an arbitral decision is reduced to writing improper?

## LIST OF PARTIES

In addition to the parties listed in the caption, the parties in this action include the International Brotherhood of Teamsters, Local 24.

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## PETITION FOR WRIT OF CERTIORARI

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Consolidated Freightways Corporation of Delaware, Inc., ("Consolidated") respectfully prays that a Writ of Certiorari issue to review the judgments and opinions of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 19, 1998, and March 13, 1995, in order to resolve the important questions: On Question I, the serious difference between the decision of the Sixth Circuit and the applicable decisions of the Court; and, on Question II, the conflict between the Sixth Circuit and the Seventh and Eleventh Circuit Courts of Appeals.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, which gives rise to Question I is reported at 147 F.3d 492 and reprinted in the Appendix, page 1a. In an Order filed on August 7, 1998, the Sixth Circuit denied a Petition for Rehearing and Suggestion for Rehearing *en banc*. App. 25a.

The opinion of the Sixth Circuit which gives rise to Question II is reported at 49 F.3d 219 and is reprinted in the Appendix, page 13a. A Petition for Rehearing and Suggestion for Rehearing *en banc* was denied.

## JURISDICTION

On March 13, 1995, the United States Court of Appeals for the Sixth Circuit issued a decision reversing the judgment of the District Court for the Northern District of Ohio dismissing Schoonover's claim on grounds that his claim was barred by the applicable period of limitations. The Sixth Circuit reversed and remanded the case to the District Court for retrial. On retrial, judgment was entered on a jury verdict in the amount of $850,000.00 for Schoonover against Consolidated and Teamsters Local 24. The judgment was timely appealed to the Sixth Circuit which issued a decision affirming the District Court's judgment for Schoonover on June 19, 1998. On August 7, 1998, the Sixth Circuit denied Consolidated's timely-filed Motion for Rehearing and Suggestion for Rehearing *en banc*. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTES INVOLVED IN THIS CASE

§ 301 National Labor Relations Act as Amended, 29 U.S.C. § 185(a), provides:

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

§ 7 National Labor Relations Act as Amended, 29 U.S.C. § 157, provides:

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 8(b)(1)(A) National Labor Relations Act as amended, 29 U.S.C. § 158(b)(1)(A), provides:

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: . . . .

Federal Rule of Civil Procedure 50(a) and (b) provides:

Rule 50. Judgment as a Matter of Law in Actions Tried by Jury; Alternative Motion for New Trial; Conditional Rulings.

(a) Judgment as a Matter of Law.

(1) If during a trial by jury a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against that party on any claim, counterclaim, cross-claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

(b) Renewal of Motion for Judgment After Trial; Alternative Motion for New Trial. Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. . . .

## STATEMENT OF THE CASE

Dennis Schoonover ("Schoonover") was an over-the-road driver for Consolidated Freightways of Delaware, Inc., ("Consolidated"), domiciled at Consolidated's terminal in Richfield, Ohio. On October 15, 1987, he was dispatched with a tractor and trailer unit to Milwaukee, which had been relayed to Richfield from a terminal in the East. Before leaving the terminal's garage, he expressed his dissatisfaction with the tractor as oil had sprayed all over the hood. Shortly after leaving the termi-

nal, Schoonover reported that the brake pedal in the Navistar International tractor fractured. Schoonover claimed that after leaving the terminal, he attempted to apply the brakes but the pedal was lying on the floorboard in two pieces.

At a hearing required by the collective bargaining agreement, Schoonover and his union representatives were informed of Consolidated's evidence that Schoonover had intentionally fractured the brake pedal in the Navistar tractor. Consolidated provided Teamsters Local 24's representatives ("Local 24") with statements regarding the incident on October 15, 1987, and the report of a metallurgist finding that the pedal was fractured by a force applied from underneath the pedal, which forced the pedal upward and backward, causing it to fracture. Consolidated also presented documentation from the manufacturer, Navistar, that it had no knowledge or record of a fracture ever occurring before in a Navistar tractor. Schoonover was discharged on October 29, 1987, for intentionally abusing company property. Appendix pp. 2a-3a, 14a.

Schoonover filed a grievance with Local 24 protesting his discharge. In investigatory interviews, Local 24 president Mozena and the Local 24 business representative assigned to the Consolidated terminal, Klayko, obtained Schoonover's version of the incident and his suggestions for investigating other incidents of fractured brake pedals. Schoonover offered no explanation as to how the pedal fractured, other than it was just laying there in two pieces when he attempted to apply the brake. He also gave them information of similar brake failures in Consolidated tractors. Mozena and Klayko, with the assistance of Schoonover's union stewards at the terminal in Richfield, investigated Schoonover's claims and did discover that there had been other fractures in Consolidated tractors. However, the pedals were in Freightliner tractors, which are not manufactured by Navistar. Moreover, the Freight-

liners had a different brake system and the failures in them were due primarily to flaws in the floorboard and pedal mountings. Appendix 9a-10a.

Mozena and Klayko asked Consolidated if Local 24 could examine a Navistar tractor in order to determine whether the pedal could be fractured by a driver. Subsequently, members of Consolidated's management made a Navistar tractor available to Mozena, Klayko and Schoonover's stewards. Local 24's representatives attempted various ways to fracture the pedal. They unsuccessfully stomped on it with boots. They attempted to fracture it by involving a tie down mechanism, which Schoonover believed could be involved. The pedal was not damaged by the tie down. Then, Sarne, Consolidated's Maintenance Manager, produced an iron bar, which is kept in each Consolidated tractor and known as a "bud bar." Sarne placed one end of the bud bar on the floor under the front part of the pedal, and with his hand on the other end of the "bud bar" and using it as a lever, he pulled upwards, easily fracturing the pedal. Appendix pp. 11a.

Mozena and Klayko met to analyze and prepare Schoonover's case for the hearing on Shoonover's grievance before the Ohio State Joint Grievance Committee ("Joint Committee"). They considered whether to use a metallurgist at the Joint Committee hearing; however, the Union had had two prior experiences in which consulting an expert had worked to the detriment of an employee. The Union could not secretly examine the pedal. The Union decided to base its position at the hearing on Schoonover's denial and to argue that Consolidated could not prove Schoonover intentionaly fractured the brake pedal. Appendix at 10a.

The hearing on Schoonovers grievance was heard by the Joint Committee on November 18, 1987. Consolidated presented its case based on the foregoing evidence. Local 24 presented its case on behalf of Schoonover as

decided by Mozena and Klayko. *Supra.* At the conclusion of the hearing, the Joint Committee recessed and held an Executive Session to decide the grievance. Schoonover remained outside the hearing room with everyone else. When the parties returned to the hearing room, the Chairman of the Joint Committee announced the Commitee's decision. Schoonover testified on direct examination, "I was told my discharge was sustained." On redirect examination, he testified it was announced that an "official notification" would be sent to the parties by mail, and that he did receive a notice on November 24, 1987. Appendix 14a-15a.

Schoonover filed his complaint in the Federal District Court for the Northern District of Ohio on May 20, 1988. Schoonover's Complaint invoked the jurisdiction of the federal court pursuant to the provisions of 29 U.S.C. §§ 142(1), (3), 152 and 185. On trial, Consolidated and Local 24 moved, pursuant to Fed.R.Civ.P. 50, for judgment as a matter of law on the grounds that Schoonover's own testimony proved that he discovered the alleged breach when he heard the arbitration decision on November 18, 1987. Therefore, his complaint was filed beyond the six month period of limitations. The motion was sustained by the District Court on December 22, 1992. Appendix 23a-24a. Schoonover appealed the dismissal to the Sixth Circuit, which reversed and remanded the case to the District Court. The rationale of the Sixth Circuit was:

> First, the rules of the governing body itself require that the decision of the panel be reduced to writing. Underlying these reasons is a reluctance to predicate federal jurisdiction on the ad hoc, unrecorded statements of an arbitration panel. . . .
>
> This view is also supported by our reluctance to predicate federal jurisdiction on the unrecorded statements of an arbitration panel. Ohio Revised Code § 2711.08 is evidence of the primacy of the written decision. Section 2711.08 requires that an

> award in an arbitration proceeding must be in writing and must be signed by a majority of the arbitrators. . . .

Appendix at 17a-18a.

A retrial commenced in the District Court on Monday, February 12, 1996. At the close of Schoonover's evidence in-chief, and again at the close of all the evidence, Consolidated and Local 24 each presented oral motions for judgment as a matter of law pursuant to Fed.R.Civ.P. 50. The District Court denied the motions. The District Court then submitted the issues to the jury at the close of the Court Session on February 22, 1996. The jury commenced deliberations on Friday, February 23, 1996, and returned its verdict at 2:08 p.m. on February 23, 1996. The jury found that Consolidated had discharged Schoonover in violation of the collective bargaining agreement and that Local 24 failed to fairly represent Schoonover. The jury returned a verdict of $850,000.00, sixty-five percent to be paid by Consolidated and thirty-five percent by Local 24.

Consolidated and Local 24 each filed timely Motions for Judgment Notwithstanding the Verdict. On May 3, 1996, the District Court denied the Motions for Judgment Notwithstanding the Verdict, stating:

> . . . [T]he evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor. If, after thus viewing the evidence, a trial court is of the opinion that it points strongly in favor of the movant that reasonable minds could not come to a different conclusion, then the motion should be granted.

Appendix p. 21a.

Consolidated and Teamsters Local 24 each filed timely notices of appeal to the Sixth Circuit. Although the question of the timeliness of filing the original complaint was again raised in the motions for judgment, that question

was not raised again in the appeal to the Sixth Circuit. The Court's decisions hold that Petitioner is not barred from presenting the question of the period of limitations to the Court.[1] In a split decision, the Majority of the Panel held:

> In order to overturn the jury's verdict on grounds that the District Court improperly denied them judgment as a matter of law, the defendants must show the evidence against Schoonover was so overwhelming that no one could reasonabl[y] find in his favor. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 970 F.2d 1461, 1470 (6th Cir. 1992). In other words, unless this Court "is left with the definite and firm conviction that a mistake resulting in plain injustice has been committed" or unless the verdict "is contrary to all reason," we must view the evidence and all reasonable inferences in Schoonover's favor.

Appendix p. 4a.

The disesnting member of the Panel stated in her Opinion:

> The majority finds that without the mistakes which the union representative made, the jury could find that the grievance committee would have decided Schoonover's grievance differently. If the union were held to a negligence or malpractice standard, I would agree. But union representatives are not lawyers. They do not have the advantage of discovery procedures. At most, the Union's failures were negligence or bad judgment, neither of which is enough to constitute the breach of the duty of fair representation.

Appendix p. 10a.

The Dissent continued to rebut the Majority's opinion "for deficiencies in the union's handling of the grievance":

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[1] *Lujan v. National Wildlife Federation*, 497 U.S. 871, 882 (1990), citing *Messenger v. Anderson*, 225 U.S. 436, 444 (1912).

> Because the record does not support the jury's verdict that Local 24 acted arbitrarily, discriminatorily or in bad faith and, outside a "wide range of reasonableness," I believe the District Court erred in not granting motion for judgment as a matter of law.

Appendix pp. 10a-12a.

The Sixth Circuit's Opinion was filed on June 19, 1998. Subsequently, Consolidated and Local 24 each filed timely Petitions for Rehearing and Suggestion for Rehearing *en banc* which were denied by the Sixth Circuit on August 7, 1998.

## REASONS FOR GRANTING THE WRIT

### I. THE SIXTH CIRCUIT'S DECISION, AFFIRMING THE DISTRICT COURT'S DENIAL OF PETITIONER'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, DIFFERS SIGNIFICANTLY FROM THE COURT'S DECISIONS ON THE "PROPER STANDARD OF UNION LIABILITY" IN A FAIR REPRESENTATION CASE.

This question was addressed by the Court at the dawn of the employee's right to maintain a personal action against his union for its breach of its duty of fair representation in *Vaca v. Sipes*.[2] The importance of resolving the question is now more significant than it has been for many years. The Court recently held in *Teamsters Local 391 v. Terry*[3] that an employee is entitled to a jury trial in a duty of fair representation case. However, the Court, in *Terry*, held, that since Terry sought money damages from his union, his claim was an action at law which is traditionally tried to a jury. While there were some jury trials prior to *Terry*, the only jury case decided by the Court, which addressed the proper standard of union liability in a duty of fair representation claim, is *Vaca v. Sipes*.

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[2] 386 U.S. 171 (1967).

[3] 494 U.S. 558 (1990).

In *Vaca* the employee had obtained a jury verdict based on the union's breach of its duty of fair representation. In reversing the decision of the Missouri Supreme Court, the Court said:

> Applying the proper standard of union liability to the facts of this case, we cannot uphold the jury's award, for we conclude that as a matter of federal law the evidence does not support a verdict that the Union breached its duty of fair representation.[4]

The Court defined the "proper standard of union liabilty" stating:

> A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith.[5]

In *Vaca*, the Court also used additional terms to characterize a union's misconduct as "unfair, irrelevant and invidious treatment." [6]

Prior to *Vaca* the Court also recognized evidence of "hostility" as evidence of breach of the duty.[7] In *Humphrey v. Moore*, the Court held that proof of the violation required "substantial evidence of fraud, deceitful action or dishonest conduct.[8]

After *Vaca*, the Court continued to remind the lower courts of the onerous burden upon the employee to prove a breach of the duty of fair representation. The Court said the doctrine "carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives." [9]

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[4] 386 U.S. at 193.

[5] *Id.* at 190.

[6] *Id.* at 177.

[7] *Ford Motor Co. v. Huffman*, 375 U.S. 330, 337 (1952).

[8] 375 U.S. 335, 348 (1964).

[9] *Street Electric Railway and Motor Coach Employees v. Lockridge*, 403 U.S. 274, 301 (1971).

More recently, the Court, in *Air Line Pilots v. O'Neill,* added a further essential consideration that must be considered when determining whether a union's conduct is a breach of the duty:

> A union's actions are arbitrary only if, in the light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness as to the irrational." [10]

The Court has also formulated additional, necessary considerations in hybrid Section 301/duy of fair representation claims. A Section 301 claim against the employer requires, in effect, the vacation of an arbitration award in order to provide a remedy for an employee who has proved the breach of the duty of fair representation by his union. In *Hines v. Anchor Motor Freight, Inc.,* the Court addressed the necessity of the union's conduct having the effect of having "tainted" a joint arbitration committee decision which "seriously flawed" the contractual processes.[11] Then in *United Parcel Service, Inc. v. Mitchell,* the Court said:

> As *Hines* makes clear, an employee may go behind a final and binding arbitration award under a collective bargaining agreement and seek relief against his employer and union *only when he demonstrates that his union's breach of its duty "seriously [undermined] the integrity of the arbitral process.*[12] (Emphasis added.)

Thus, in *Hines* and *Mitchell,* the court has greatly increased the evidence necessary to meet the "proper standard of union liability" as initially established by *Vaca.* Additionally, the Court has recently stated that "mere

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[10] 499 U.S. 65, 67 (1991).

[11] 424 U.S. 554, 568, 570 (1976).

[12] 451 U.S. 56, 61 (1981).

negligence" cannot be held to be a breach of the duty of fair representation." [13]

The doctrine of the duty of fair representation has been continuously evolving from the Court's first acknowledgment that the statutory duty was actionable. The several decisions defining and redefining the definition present a challenge to federal courts in properly applying the fluid standard of union liability. The doctrine is continuously evolving with new terminology which appears to constantly remind the lower courts that the employee's burden is truly onerous. *Supra.* However well the lower courts may understand and apply the doctrine, a critical question which emerges in this Petition is whether a jury can be left to apply the proper standard of union liability. The Petitioner maintains the decision of the Sixth Circuit recklessly disregards the Court's decisions defining the doctrine and the proper standard of liability. The jury in this case was allowed to decide the standard of union liability and, in effect, vacate the Joint Committee's decision, which requires at least some relevant knowledge of federal labor law.

The Dissent in the Sixth Circuit fairly stated the facts and rationally analyzed the evidence in concluding that, at the very most, Local 24's conduct was negligent. Appendix p. 10a. Contrarily, the District Court neither identified Local 24's misconduct nor provided any analysis of the facts or law to support its decision that there was sufficient evidence to submit the question to the jury. Appendix pp. 21a-22a. The panel Majority in the Sixth Circuit did not base its decision on facts in the record. Rather, the Panel Majority speculated how the jury "could" have found facts that "could" have proved a breach of Local 24's duty of fair representation. The Dissent in the Sixth Circuit provides the only judicial analysis of the issue.

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[13] *Steelworkers v. Rawson*, 495 U.S. 362, 373 (1990).

The question posed herein is whether the "standard of union liability" is for a jury to decide, or, is it the district court's duty to first determine whether there is substantial evidence of the standard which is sufficient, or not, to submit the question to the jury. The district court must also determine whether there is substantial evidence that a union's breach of its duty of fair representation *could* have "seriously undermined" the arbitral decision before submitting the question to the jury.

The Majority of the Sixth Circuit Panel believed the jury *could* make both determinations: "The jury *could* have also found that the Teamsters Local breached its duty of fair representation to Schoonover in the way it handled his grievance"; "This record contains ample evidence from which the jury *could* have concluded that Consolidated breached the collective bargaining agreement, that the Teamsters Local breached its duty of fair representation and that this breach tainted the outcome of the hearing before the grievance committee." Appendix pp. 7a-8a.

The Panel Majority also applied the wrong standard of review to the question of whether there was sufficient evidence to submit the question to a jury. The Sixth Circuit has historically held that the standard of review of a jury verdict is de novo.[14] However, here, the Panel Majority said "the defendants must show the evidence against Schoonover was so overwhelming that no one could reasonabl[y] find in his favor. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 970 F.2d 1461, 1470 (6th Cir. 1992)." Appendix p. 4a. *Black* is a case in which the Sixth Circuit Panel reviewed the excessiveness of a damage award. While the award was excessive in this case, it was not appealed.

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[14] *K & T Enterprises v. Zurich Ins. Co.*, 93 F.2d 171, 174 (6th Cir. 1996); *Schneider v. A.G. Trucking, Inc.*, 57 F.3d 484, 490 (6th Cir. 1995); *Agristor Leasing v. A.O. Smith Harvester Store Products*, 869 F.2d 264, 268 (6th Cir. 1989).

The parties and the lower courts need to know where to find a line, even a wide line, separating conclusions of law from findings of fact on the question of a union's liability for breach of its duty of fair representation. Petitioner submits that the decision whether a union's conduct is "arbitrary, discriminatory or in bad faith" is more in the nature of a conclusion of law for the court and less like a finding of fact for a jury. It is not easy to establish such a line because of the complexity and arcane nature of the duty of fair representation. Consolidated submits, however, it is necessary to provide guidance.

## II. THE DECISION OF THE SIXTH CIRCUIT, THAT THE LIMITATIONS PERIOD ON SCHOONOVER'S DUTY OF FAIR REPRESENTATION CLAIM DID NOT ACCRUE UNTIL THE JOINT COMMITTEE DECISION WAS REDUCED TO WRITING, IS IN CONFLICT WITH THE DECISIONS OF THE SEVENTH CIRCUIT AND THE ELEVENTH CIRCUIT.

The evidence is undisputed that Schoonover heard the Joint Committee's decision that his "discharge was sustained." In *Metz*, the Seventh Circuit stated that as a "general rule," the limitations period begins to run ". . . when claimant discovers, or in the exercise of reasonable diligence should have discovered, the acts constituting the alleged [violation]."[15] The Seventh Circuit held that the employee's claim accrued when she failed to file her lawsuit within the limitation period and should have discovered the alleged violation at some point prior to six months before the filing of her claim.

In *Samples v. Ryder Truck Lines*, the Eleventh Circuit held that "knowledge of the union's breach can normally

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[15] *Metz v. Tootsie Roll Industries*, 715 F.2d 299, 301, 304 (1983), citing *Hungerford v. United States*, 307 F.2d 99, 102 (9th Cir. 1962); *N.L.R.B. v. Don Burgess Contruction Corp.*, 596 F.2d 378, 382 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979).

be attributed to the employee at the moment when he learns of the unfavorable award." [16]

In this case, Schoonover discovered the alleged violation when the Joint Committee announced its decision on November 18, 1987. The Sixth Circuit extended the limitations period for Schoonover's claim until the time he received written notification because: "The rules of the governing body required the decision to be reduced to writing" (Appendix p. 17a) and "there is a reluctance to predicate federal jurisdiction on the ad hoc, unrecorded statements of an arbitration panel"; and, "Ohio Revised Code § 2711.08 requires an arbitration award to be in writing and signed by a majority of arbitrators." Appendix p. 18a.

Not surprisingly, there is no precedent cited for the Sixth Circuit's statement that there is a reluctance to predicate federal jurisdiction on unwritten arbitration decisions as there are none. Further, it is axiomatic that subject matter within the purview of federal statutes are not subject to state law. The axiom applies to arbitration under collective bargaining agreements within the federal jurisdiction as there is no federal case to the contrary.[17]

The Sixth Circuit's explanation of the necessity of a written decision is irrelevant to the question of when the duty of fair representation claim accrues. What is more relevant is, previous to this case, the Sixth Circuit held that the claim accrues when the union tells the employee that he lost his grievance and not when he receives a copy of the written award.[18]

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[16] 755 F.2d 881, 887, n.7 (11th Cir. 1985).

[17] *E.g. Carey v. General Electric*, 21 F. Supp. 276 (D.C. N.Y. 1962), modified on other grounds, 315 F.2d 499, *cert. denied*, 377 U.S. 908.

[18] *Dowty v. Pioneer World Electric Co-op., Inc.*, 770 F.2d 52, 56 (6th Cir. 1985).

The practical significance of the Sixth Circuit's decision is that it may destroy, or at least disrupt, the Teamster/trucking industry agreements which provide for the resolution of grievances to be resolved by joint committees. The Court's reasoning has been that arbitrators are indispensable agencies to a continuous collective bargaining process as they "settle disputes at the plant level—disputes that require for their solution knowledge of the custom and practices . . . of a *particular industry* as reflected in particular agreements.[19] Joint committees are the perfect example of the Court's doctrine. The Teamster/trucking industry joint committees are especially knowledgeable in the law of their agreemens and the practices of the industry as well as the operations of the industry itself. In fact, their members may be involved in negotiating the collective bargaining agreements. The joint committees not only decide serious questions like Schoonover's discharge, they also decide numerous grievances of lesser consequence which a union may not take to arbitration because of the expense involved.

The result of the Sixth Circuit's decision can be that joint committees may require more time to write decisions for each and every grievance, which will take time away from the necessary function of hearing and deciding those grievances. In the long run, the joint committees could be less effective in serving the interests of the union members.

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[19] *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 596 (1960).

## CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

EDWARD C. KAMINSKI
AMER CUNNINGHAM BRENNAN
Co., L.P.A.
Sixth Floor, Key Building
159 South Main Street
Akron, OH 44308-1322
(330) 762-2411
*Attorney for Petitioner*
*Consolidated Freightways*
*Corporation of Delaware, Inc.*

# APPENDIX

**APPENDIX**

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Nos. 96-3623/3624/3683

DENNIS W. SCHOONOVER
(96-3623),
*Plaintiff-Appellee/Cross-Appellant,*

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE (96-3624) and LOCAL 24, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA (96-3683),
*Defendants-Appellants/Cross-Appellees.*

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Appeal from the United States District Court
for the Northern District of Ohio at Cleveland
No. 88-01447—George W. White, Chief District Judge

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Argued: February 5, 1998
Decided and Filed: June 19, 1998

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OPINION

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MERRITT, Circuit Judge. In this hybrid lawsuit brought under 301 of the Labor Management Relations

Act, 29 U.S.C. 185, Defendants Consolidated Freightways Corporation and Teamsters Local 24 challenge the sufficiency of the evidence supporting a $850,000 jury verdict for Plaintiff Dennis Schoonover. This is a fact-intensive case in which the applicable legal standards are well settled. The basis for the defendants' appeal is that the District Court erroneously denied their motions for judgment as a matter of law. In a separate appeal, Schoonover contends the District Court improperly prevented him from presenting expert testimony on rebuttal as well as proof of pain, suffering, and punitive damages. Because the record contains ample evidence to support liability under 301, we affirm the jury's verdict against the defendants. We also conclude the District Court's evidentiary decisions were within its discretion and therefore reject Schoonover's assignments of error.

Dennis Schoonover was a truck driver for Consolidated. He was discharged for intentionally destroying company property, specifically the brake pedal of the tractor he was driving to Milwaukee. On the day in question, the pedal broke off within twenty-five minutes of Schoonover's departure from the terminal. Consolidated claimed that Schoonover broke the pedal in retaliation against his supervisors for making him drive a "piece of junk." His supervisors believed that he had used a long tire iron (or "bud bar") to pry the pedal off so that he could drive a different rig to Milwaukee. They reached this conclusion by prying the pedal off another tractor in this manner. Schoonover, on the other hand, vehemently denied breaking the pedal. According to him, when he went to put on the brakes at the first major intersection on his route, the pedal was lying on the floorboard in two pieces. This story was corroborated by another truck driver who saw Schoonover perform an emergency stop at this intersection, which would be consistent with a normal brake failure. Schoonover speculated that the brake tie-down mechanism, which holds the pedal down while the driver check the brake system, could have caused the pedal to

break. Purportedly, the tie-down could have lodged under the pedal, causing it to snap off when a driver depressed the brake, or it may have caused cracks in the die-cast metal by repeatedly allowing the pedal to snap back into place after a drive disengaged it.

After a hearing, Consolidated fired Schoonover for "blatant and intentional abuse of company equipment." The union subsequently filed a grievance on Schoonover's behalf. Pursuant to the collective bargaining agreement between the Teamsters and Consolidated, the case went to arbitration before the Ohio State Grievance Committee. Although Consolidated presented expert testimony from a metallurgist who testified that the pedal was broken by upward pressure, Schoonover's union representatives chose not to rebut this evidence with their own expert testimony. The arbitration committee denied Schoonover's grievance and sustained his discharge.

Schoonover then filed this federal lawsuit against Consolidated for violating the collective bargaining agreement and Teamsters Local 24 for breaching its duty of fair representation. The case went to trial. At the close of Schoonover's case the District Court granted the defendants' motion for judgment as a matter of law on grounds that the complaint was time-barred. This Court reversed, holding that the six-month statute of limitations for hybrid 301 actions did not begin to run until the arbitration panel's decision was reduced to writing. Schoonover v. Consolidated Freightways Corp. of Delaware, 49 F.3d 219 (6th Cir. 1995). The case then proceeded to a second trial upon remand. At the conclusion of all the evidence, the defendants again moved for judgment as a matter of law, arguing Schoonover had failed to establish a prima facie case. The District Court denied the motion. The jury returned a verdict in favor of Schoonover and awarded him $850,000 in damages, finding Consolidated liable for 65 percent of the damages and the Teamsters Local for 35 percent. The defendants both renewed their motions for judgment as a matter of law, which the Dis-

trict Court also denied in a brief written opinion. The defendants' appeal challenges the District Court's denial of their motions for judgment as a matter of law before and after the verdict.

In order to overturn the jury's verdict on grounds that the District Court improperly denied them judgment as a matter of law, the defendants must show the evidence against Schoonover was so overwhelming that no one could reasonable find in his favor. Black v. Ryder/P.I.E. Nationwide, Inc., 970 F.2d 1461, 1470 (6th Cir. 1992). In other words, unless this Court "is left with the definite and firm conviction that a mistake resulting in plain injustice has been committed," or unless the verdict "is contrary to all reason," we must affirm the jury's verdict. Id. On review, this Court cannot weigh the evidence, determine credibility, or substitute its judgment for that of the jury. Instead, we must view the evidence and all reasonable inferences in Schoonover's favor. Id.

At trial, Schoonover presented evidence which, if believed, suggested that his supervisors at Consolidated set him up and then fabricated evidence to assure his dismissal. He testified that prior to his incident one of his supervisors had threatened him, precipitating a number of unfounded warning letters against him. This served as the background to what Schoonover depicted as a concerted effort by his superiors to run him off. The evidence indicated that his supervisors were convinced he had broken the pedal out of spite and thus went in search of ways to confirm their suspicions. A number of witnesses testified that when the company reenacted the incident for the union, a supervisor had doctored the pedal to make it look like Schoonover could have easily broken the pedal with a bud bar in the short time he was gone from the terminal. In fact, Schoonover's attorney played the jury a videotape he stumbled upon in discovery, which showed several Consolidated representatives struggling for over two hours to break an identical pedal. Apparently these representatives discovered that the die-cast metal pedal

could only be broken with the leverage provided by a wooden block, which Schoonover did not have in his cab. Moreover, although the testimony of Consolidated's metallurgist appeared invulnerable at the arbitration hearing, the trial disclosed that Consolidated had only asked the expert to determine the direction of the break, not its possible causes. Consolidated's own expert admitted at trial that the pedal could have broken either from a prying force applied from above or from an object, such as the tie-down mechanism, lodged underneath. In addition, Schoonover's expert metallurgist presented trial testimony that the pedal contained structural defects which the company's expert had overlooked.

Schoonover also presented evidence suggesting that the union never took his grievance seriously and thus provided him inadequate representation at his grievance committee hearing. His theory of the case was that after Consolidated presented its doctored reenactment of the incident to the union, his union representatives gave up on his grievance. One of the union officials involved in the investigation testified that the reenactment was so convincing that the union never confirmed the company's version of events or even tried to pry a pedal off with a bud bar. Although his union delegates knew that the company had hired a metallurgist to provide expert testimony on the decisive issue at the hearing, they did not hire their own expert or even interview the company's expert. In fact, Schoonover's representative at his discharge hearing testified that cases involving destruction of company property are the hardest to resolve and often turn on expert testimony. This representative also admitted that the union could and should have brought a truck to the hearing to show the arbitrators how difficult it is to actually break a pedal with a bud bar. Furthermore, Schoonover showed that he provided the union with a list of drivers who had experienced similar incidents, but the union did not pursue these leads when it learned the incidents occurred in tractors made by a different

manufacturer. Two of these drivers provided trial testimony that the die-cast metal pedals in their trucks were similar to the one in Schoonover's truck and that the metal had either cracked or broken in half. Ultimately, the court admitted substantial evidence suggesting the union's representation of Schoonover at the arbitration hearing was perfunctory. Testimony revealed that the union only met with Schoonover once the Sunday before the hearing, that its presentation at the hearing only lasted fifteen minutes, and that its representatives apparently made little effort to rebut the company's evidence. This apparently left Schoonover to ask the grievance committee merely to believe his side of the story.

After weighing this evidence, the jury found that Consolidated breached the collective bargaining agreement and that the Teamsters Local breached its duty of fair representation. In a special verdict, the jury found Consolidated's termination of Schoonover was a breach of its contract with the union. Further, the jury determined the Teamsters Local breached its duty of fair representation to Schoonover in the grievance and arbitration procedures. Finally, the jury decided the union's breach tainted the hearing in such a way that the arbitration committee would have reached a different result without the breach. These findings specifically trace the requirements for liability in a hybrid 301 case. See Black v. Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573, 585 (6th Cir. 1994). On the defendants' requests for postjudgment relief, the District Court concluded the evidence was sufficient and found the jury's verdict reasonable.

Viewing the evidence in the light most favorable to Schoonover, we believe the jury's verdict was is not "contrary to all reason" or based on a "mistake resulting in plain injustice." See Black, 970 F.2d at 1470. In hybrid 301 cases, the focus is on "whether . . . the employer breached the contract and whether there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings."

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 568 (1976). This jury could have reasonably concluded that Consolidated breached the contract when its employees doctored the pedal they used to reenact the incident for the union. The videotape, showing that the pedal was not as easy to break as Consolidated made it appear, was strong circumstantial evidence for Schoonover's theory that his supervisor set him up. The jury could have also found that the Teamsters Local breached its duty of fair representation to Schoonover in the way it handled his grievance. Refusing to call a metallurgist, when the union representatives knew such testimony was crucial; failing to investigate similar incidents involving broken pedals, when that evidence could have convinced the arbitrators that Schoonover's incident was not as unusual as it appeared; crediting Consolidated's reenactment of the incident, when an independent investigation would have revealed that Schoonover could not have broken the pedal with only a bud bar in the short time he was gone from the terminal; and neglecting to bring a truck to the hearing, when its presence would have allowed the grievance committee to test the company's version of the facts for themselves, are all substantial reasons which, in combination, would justify the jury's finding that the union's representation of Schoonover was "arbitrary, discriminatory, perfunctory, or in bad faith." Apperson v. Fleet Carrier Corp., 879 F.2d 1344, 1355 (6th Cir. 1989); see also Vaca v. Sipes, 386 U.S. 171, 190 (1967). Without these mistakes, it is certainly conceivable that the grievance committee would have decided Schoonover's grievance differently.

Our review of the record has failed to produce any definite or firm conviction that the defendants have suffered any injustice from the verdict. This record contains ample evidence from which the jury could have concluded that Consolidated breached the collective bargaining agreement, that the Teamsters Local breached its duty of fair representation, and that this breach tainted the out-

come of the hearing before the grievance committee. We conclude the evidence sufficiently supports liability in a hybrid 301 case, see Black, 15 F.3d at 585, and therefore affirm the jury's verdict. As for Schoonover's cross-appeal of the decision to exclude his expert's testimony on rebuttal and his evidence of punitive damages, we conclude the District Court acted within its discretion. See Benedict v. United States, 822 F.2d 1426, 1428-29 (6th Cir. 1987); Wilson v. Int'l Bhd. of Teamsters, 83 F.3d 747, 754-55 (6th Cir. 1996). Accordingly, the judgment of the District Court is affirmed.

## DISSENT

KENNEDY, Circuit Judge, dissenting. Because the evidence, even in the light most favorable to plaintiff, does not permit a finding that the Union acted "in such a discriminatory, dishonest, arbitrary or perfunctory fashion as to breach its duty of fair representation," the standard set in DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 164 (1983), I respectfully dissent.

There are three distinct ways in which a union can breach the duty of fair representation: by taking actions that are arbitrary, discriminatory or in bad faith. Black v. Ryder/P.I.E. Nationwide, Inc., 15 F.3d 573, 584 (6th Cir. 1994). Negligence fails to satisfy any prong of this tripartite standard. Dushaw v. Roadway Express, Inc., 66 F.3d 129, 133 n.1 (6th Cir. 1995) (citing United Steelworkers of America v. Rawson, 495 U.S. 362, 372-73 (1990)). A plaintiff seeking to establish a union's breach of the duty of fair representation is met with an "onerous burden." Black, 15 F.3d at 585. A union's action will be found arbitrary only if "the union's behavior is so far outside a 'wide range of reasonableness' . . . as to be irrational." Air Line Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 67 (1991)).[1] A plaintiff also must show that any breach more likely than not tainted the grievance procedure, substantially affecting the outcome. Dushaw, 66 F.3d at 132 (citing Black, 15 F.3d at 585). The record reflects that the Union investigated the brake pedal incident; followed leads as to other brake pedal

[1] Plaintiff argues that O'Neill's "wholly irrational" standard is inapplicable to grievance procedings because O'Neill involved contract negotiations. We rejected this argument in Walk v. P*I*E* Nationwide, Inc., 958 F.2d 1323, 1326 (6th Cir. 1992). (O'Neill's standards apply to both contract negotiations and grievance proceedings).

fractures; interviewed and took the statement of the only eyewitness to the incident; and pursued, considered and tested theories consistent with plaintiff's denial that he did not intentionally break the pedal.

The majority finds that without the mistakes which the union representative made, the jury could find that the grievance committee would have decided Schoonover's grievance differently. If the Union were held to a negligence or a malpractice standard, I would agree. But union representatives are not lawyers. They do not have the advantage of discovery procedures. At most, the Union's failures were negligence or bad judgment, neither of which is enough to constitute the breach of duty of fair representation. Walk v. P*I*E Nationwide, Inc., 958 F.2d 1323, 1326 (6th Cir. 1992) ("[S]imple negligence or mere errors in judgment will not suffice.")

The majority points to four deficiencies in the Union's handling of the grievance to support the jury's verdict. First, the Union's failure to have the pedal examined by a metallurgist. The Union made what could now appear to be the erroneous decision to refrain from hiring its own expert to discern how the pedal was broken. The Union had had two prior experiences in which consulting an expert had worked to the detriment of an employee. The Union could not secretly examine the pedal. The Union decided to base its position at the grievance proceeding on plaintiff's denial and to argue that Consolidated could not prove plaintiff intentionally fractured the brake pedal. The Union's decision may well have been a mistake but it was neither perfunctory nor arbitrary. It was based on prior unsatisfactory experiences with experts. The expert's report merely stated that the fracture was caused by an upward force, a conclusion with which both experts at trial agreed. The decision not to have the brake pedal examined by a metallurgist cannot be said to be outside the range of reasonableness.

The second reason given by the majority is "failing to investigate similar incidents." Plaintiff provided the Union with information about incidents in other locations where brake pedals failed. The Union contacted local union presidents in those locations as well as various drivers. It learned that the failures were in Freightliner trucks, which have different brake systems and were due primarily to flaws in floorboard and pedal mountings.[2] Even with all the discovery, the trial did not produce similar incidents.

Third, the majority states that the Union should not have credited Consolidated's re-enactment of the incident, but should have made an independent investigation; that is, tried to break a pedal with a bud bar itself. While in hindsight that should have been done, the union representatives had observed Sarne break a similar pedal with a bud bar. While this was not the first time Sarne had tried to break a pedal and he had had trouble breaking one until he learned where to put the bud bar, he broke this one on his first attempt in the union representative's presence. While they were unaware of his earlier practice attempts, still he did break it with ease. The union representatives had tried, without success, to see if the tie back bar could cause the pedal to break. While the Union might have established that it was difficult to break the pedal with a bud bar, there is no suggestion in the record that it cannot be done. The Union did not have the ready access to trucks for destructive tests that the employer did. It did not own trucks on which it could experiment at will.

Finally, the majority finds the Union breached its duty of fair representation by not bringing a truck to the hear-

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[2] Had the Union investigated Navistar brake failures further, it would have learned that Navistar had no record of any similar fracture problem with any other International pedals. While plaintiff at trial produced evidence of other brake failures, he produced no evidence of any other similar failure of an International pedal.

ing where the grievance committee could test the company's version of the facts. In the earlier demonstration, the union representatives had observed a bud bar break the pedal. Whether to permit the grievance committee to conduct its own experiment or not seems to me to be a judgment call well within a wide range of reasonableness. The grievance committee members were all familiar with trucks.

Because the record does not support the jury's verdict that Local 24 acted arbitrarily, discriminatorily or in bad faith, and outside "a wide range of reasonableness," I believe the District Court erred in not granting the Union's motion for judgment as a matter of law.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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No. 93-4147

DENNIS W. SCHOONOVER,
*Plaintiff-Appellant,*
*v.*

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE and LOCAL 24, FREIGHT DRIVERS, DOCKWORKERS AND HELPERS,
*Defendants-Appellees.*

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On Appeal from the United States District Court
for the Northern District of Ohio

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Decided and Filed March 13, 1995

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Before: MERRITT, Chief Judge; KEITH and BOGGS, Circuit Judges.

BOGGS, Circuit Judge. Dennis Schoonover appeals a judgment as a matter of law in favor of Consolidated Freightways Corporation of Delaware and Local 24, Freight Drivers, Dockworkers and Helpers. The district court granted the judgment at the close of Schoonover's case because it believed that Schoonover had failed to file his complaint within the required statute of limitations. For the reasons set out below, we reverse.

# I

Consolidated Freightways fired Schoonover on October 29, 1987 for intentionally abusing company property by allegedly breaking a brake pedal on one of Consolidated's trucks. At the time of the alleged incident, Schoonover drove a truck for Consolidated on an over-the-road route between Richfield, Ohio and Milwaukee, Wisconsin.

On October 15, 1987, Schoonover went to the truck "ready line" at Consolidated's Richfield depot to pick up his assigned tractor and trailer. He did a normal pre-run inspection of the truck, including a check of the braking system for air leaks. After taking the truck to the garage for some minor repairs, Schoonover set out on his run.

Shortly after leaving Consolidated, Schoonover approached a traffic light and attempted to brake. Schoonover alleges that he slid his foot from the accelerator to the brake pedal, only to discover nothing was there. He used the emergency brakes to stop the truck. Schoonover pulled the truck off the road, and returned to the depot where Consolidated gave him another truck.

On October 20, 1987, Schoonover received notice that Consolidated was investigating the cause of the breakdown and would hold a hearing. Consolidated held the hearing at the Richfield facility on October 29, 1987. Consolidated's manager of linehaul personnel, Thomas Kenny, presided. Union representatives were present, but Schoonover alleges that they never contacted him before the hearing, nor did they present any evidence on his behalf. At the end of the hearing, Consolidated fired Schoonover for abuse of company property.

Schoonover then filed an application for grievance arbitration before the Ohio State Joint Grievance Committee, the arbitration body created by the collective bargaining agreement. The Committee set a hearing for November 18, 1987. After both parties presented their

cases, the Committee asked them to leave the hearing room. At trial, Schoonover testified that "approximately five to ten minutes later we were recalled and I was told my discharge was sustained." Schoonover also testified that an arbitrator announced that an "official notification" of the Grievance Committee's findings would be sent to the parties by mail. Schoonover received his notice by mail on November 24, 1987.

Schoonover filed his complaint on May 20, 1988. In his complaint and amended complaint, Schoonover alleged that he learned of the Grievance Committee's decision sustaining his discharge on November 24, 1987. At the close of Schoonover's case, and in light of his testimony, Consolidated and the Local moved pursuant to Fed. R. Civ. P. 50 for judgment as a matter of law. They argued that Schoonover's testimony demonstrated that he learned of the arbitration decision on November 18, 1987. Therefore, the filing of his original complaint was beyond the six-month statute of limitations. The district court granted the motions.

## II

The appropriate statute of limitations for a hybrid § 301/duty of fair representation action is the six-month period provided in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983). In *DelCostello*, the Supreme Court held that for purposes of a hybrid § 301/unfair representation action, the statute of limitations begins to run when the claimant knows or should have known of the union's alleged breach of its duty of fair representation. *Id.* at 170-72; *Dowry v. Pioneer World Elec. Co-op, Inc.*, 770 F.2d 52, 56 (6th Cir.), *cert. denied*, 474 U.S. 1021 (1985). *See also Fox v. Parker Hannifin Corp.*, 914 F.2d 795, 803-04 (6th Cir. 1990); *Ryan v. General Motors Corp.*, 929 F.2d 1105, 1111 (6th Cir. 1989); *Chrysler Workers Ass'n v. Chrys-*

*ler Corp.*, 834 F.2d 573, 578-81 (6th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988); *Shapiro v. Cook United, Inc.*, 762 F.2d 49, 51 (6th Cir. 1985).

Generally, "a cause of action accrues when the plaintiff could have successfully maintained a suit based on that cause of action." *Ghartey v. St. John's Queens Hosp.*, 869 F.2d 160, 163 (2d Cir. 1989) (citations omitted). Therefore, a party is not required to sue before the arbitration panel renders its final decision.[1] "The better course is to permit the plaintiff claiming inadequate representation in an arbitration to wait until there has been some adverse outcome in the arbitration before seeking the intervention of a federal court." *Ghartey*, 869 F.2d at 163. *See also Galindo v. Stoody Co.*, 793 F.2d 1502, 1509 (9th Cir. 1986) ("where a duty of fair representation suit seeks to overturn an unfavorable arbitration award on the ground that the union committed errors in the arbitration proceedings, the claim accrues when the employee learns of the arbitrator's award"); *Samples v. Ryder Truck Lines, Inc.*, 755 F.2d 881, 887 n.7 (11th Cir. 1985) ("knowledge of the union's breach can normally be attributed to the employee at the moment when he learns of the unfavorable award").

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[1] Of course this statement does not apply to those situations where the breach of fair representation stems from the union's failure to bring the arbitration claim or the union's decision to abandon it before its resolution. In those circumstances, the law looks to when the grievant knew or should have known that the union had elected to proceed no further. The statute of limitations then starts from that point. *McCreedy v. Local Union No. 971, UAW*, 809 F.2d 1232, 1236 (6th Cir. 1987) ("employee's hybrid cause of action may arise when the Union takes an unequivocal position that it will not seek arbitration"); *See also Sosbe v. Delco Elecs. Div. of G.M.C.*, 830 F.2d 83, 87 (7th Cir. 1987); *Demchik v. General Motors Corp.*, 821 F.2d 102, 105-06 (2d Cir. 1987); *Harper v. San Diego Transit Corp.*, 764 F.2d 663, 669 (9th Cir. 1985); *Taylor v. Ford Motor Co.*, 761 F.2d 931, 934 (3rd Cir. 1985), *cert. denied*, 474 U.S. 1081 (1986).

Simply stated, requiring exhaustion of the grievance process is appropriate because the arbitration award may make the employee whole, in spite of even the most egregious union failures. *See Lucas v. Mountain States Tel. & Tel.*, 909 F.2d 419, 421 (10th Cir. 1990). To require otherwise would undermine the strong national policy favoring nonjudicial resolution of labor disputes by penalizing those who try to resolve their disputes through the grievance process before filing suit in federal court. *Id.* at 422.

III

The norrowly drawn issue is whether the oral statement by the arbitration panel can fairly be called the arbitration award. We conclude it cannot. In particular, we note two factors. First, the rules of the governing body itself require that the decision of the panel be reduced to writing. Underlying these reasons is a reluctance to predicate federal jurisdiction on the ad hoc, unrecorded statements of an arbitration panel.

Article 3, Paragraph 16 of the "Organization and Rules of Procedure" of the Ohio Joint State Grievance Committees states that "[d]ecisions rendered by the Joint State Committee shall be reduced to writing and signed by the Co-Chairman and the Secretary." [2] Furthermore, in this case there was a written decision. The decision, while not lengthy, describes the parties, names the Union and employer representatives, and notes that Schoonover participated in the hearing. It includes a brief summary of the charges and the defenses offered or relief requested. Finally, it includes a decision, and a note that it was

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[2] Apparently in recognition of the problem posed by unrecorded decision-making, the rules were amended, pursuant to a national directive, in October of 1991. The amendment states that "the state committees are instructed to record, (tape or stenographic) all discharge cases." These recordings are to be retained for four months and are available pursuant to a subpoena.

unanimous. The panel held that "[b]ased on the evidence presented, the discharge of D. Schoonover is sustained."

This view is also supported by our reluctance to predicate federal jurisdiction on the unrecorded statements of an arbitration panel. Ohio Revised Code § 2711.08 is evidence of the primacy of the written decision. Section 2711.08 requires that an award in an arbitration proceeding must be in writing and must be signed by a majority of the arbitrators.[3] *See, e.g., Lockhart v. American Reserve Ins. Co.*, 440 N.E.2d 1210 (Ohio Ct. App. 1981). While the Ohio statute is not binding authority, it nonetheless provides evidence of the bias against unrecorded arbitration awards.

Consolidated's reliance on prior opinions in this area is unpersuasive. Each of these cases is readily distinguishable on the same grounds. For example, in *Dowry v. Pioneer World Elec. Co-op, Inc.*, 770 F.2d 52 (6th Cir.), *cert. denied*, 474 U.S. 1021 (1985), there was no doubt that the arbitration body in question had rendered its final decision and award. The panel rendered the arbitration decision on June 24, 1981. The Union gave notice to the plaintiff on July 7th, and the plaintiff received official notice on July 10th. The statute began running on July 7th. *Id.* at 54-55.

Arbitration decisions fall into three categories: those reduced to writing; those that, while not reduced to writing have been preserved in an audio or stenographic record; and those decisions for which memory is the only basis for jurisdiction and review. Obviously, parties can generally arrange their affairs however they please. Labor and management can choose to make any type of decision the final enforceable order of the panel. And if they prefer to rely on memory alone that is their right. Here however, the arbitration rules require a written decision

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[3] The Ohio Statute is drawn from the Uniform Arbitration Act, which has been adopted in approximately 37 states.

and there was a written decision, both of which are in line with the common sense bias in favor of written or recorded dispositions.[4] Therefore, we conclude that there was no formal arbitration decision until the panel reduced it to writing as required by its rules, and as it eventually did. It is from this point that the statute of limitations begins to run.

To do otherwise would require a plaintiff to convince a judge that federal jurisdiction lies based only on his asserted memory of the decision. For if the appellees are correct, Schoonover could have sued the same day he heard the panel's remarks, based on his understanding of them. A district judge would be understandably reluctant to entertain such a suit in general, let alone where the arbitration rules purport to require a written decision. We hold that while formal notice of a decision to the grievant is not required, a formal decision of some sort by the panel is required to begin the running of the statute of limitations. The oral statements made by the panel in this case do not constitute such a formal decision.

## IV

The judgment of the district court is REVERSED: The matter is REMANDED to the district court for proceedings consistent with this opinion.

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[4] *See* Samuel Goldwyn ("A verbal contract isn't worth the paper it's written on") (attributed).

[Filed May 3, 1996]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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Case No. C88-1447A
HON. GEORGE W. WHITE

DENNIS SCHOONOVER,
*Plaintiff,*

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, *et al.*,
*Defendants.*

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MEMORANDUM AND ORDER

This matter is before the Court upon the Motions for Judgment Notwithstanding the Verdict submitted by defendants, Consolidated Freightways (Dkt. #239) and Teamster Local No. 24 (Dkt. #238). On February 23, 1996, a jury returned a verdict in favor of plaintiff, Dennis Schoonover, on his hybrid Section 301/Duty of Fair Representation claim.[1] Specifically, the jury found Consolidated violated the collective bargaining agreement; the union breached its duty of fair representation; and the union's representation of plaintiff had the probable effect of causing an erroneous outcome at the arbitrage stage. *See* Jury Interrogatories (Dkt. #236).

The Sixth Circuit has stated that:

> The issue raised by a motion for a judgment notwithstanding the verdict is whether there is sufficient evi-

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[1] Plaintiff's action arises under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 301.

> dence to raise a question of fact for the jury. In determining whether the evidence is sufficient, the trial court may neither weigh the evidence, pass on the credibility of witnesses nor substitute its judgment for that of the jury. Rather, the evidence must be viewed in the light most favorable to the party against whom the motion is made, drawing from that evidence all reasonable inferences in his favor. If, after thus viewing the evidence, the trial court is of the opinion that it points so strongly in favor of the movant that reasonable minds could not come to a different conclusion, then the motion should be granted.

*Ratliff v. Wellington Exempted Village Schools Bd. of Ed.*, 820 F.2d 792, 795 (6th Cir. 1987) (citing *Morelock v. NCR Corp.*, 586 F.2d 1096, 1104-05 (6th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979)).

This Court finds that the evidence was sufficient to raise a question of fact for the jury. Viewing the evidence presented at trial in a light most favorable to plaintiff, including the testimony concerning the manner in which the pedal could have broken and the conflicting testimony regarding Local No. 24's handling of the arbitration, the Court does not find the jury verdict to be unreasonable.

Moreover, defendants' argument that plaintiff's claims are barred by the applicable six month statute of limitations is without merit. The Sixth Circuit rendered an opinion on May 30, 1995 concerning this exact issue. *Schoonover v. Consolidated Freightways Corp. of Delaware, et al.*, No. 93-4147 (6th Cir. 1995). Although defendants assert that the subsequent trial has produced substantially different evidence such that the circuit court's ruling should no longer apply, this Court does not agree. The Court finds that the evidence presented at trial did not alter the circuit court's underlying judgment.

Accordingly, defendants' Motions for Judgment Notwithstanding the Verdict are hereby *denied*.

IT IS SO ORDERED.

/s/ George W. White
GEORGE W. WHITE
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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No. 88-01147

DENNIS SCHOONOVER,

*Plaintiff,*

vs.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE, *et al.*,

*Defendants.*

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ORAL OPINION
Tuesday, December 22, 1992

(Jury not present.)

[472] THE COURT: There isn't any question that under *DelCostello vs. International Brotherhood of Teamsters 462 U.S. 151*, the Supreme Court has said that a six months Statute of Limitation governs a hybrid 301 claim.

The question that is presented to this Court is whether the plaintiff, on November 18, 1987, knew or should have known of the arbitration panel's decision.

The defense, as I understand it, claims that he knew because of his testimony under oath that he was told to wait outside, and then what he was brought in he was advised of the panel's decision, on November 18. And therefore the time would have run when he filed his claim. Six months, period. The Plaintiff's claim is that the time doesn't run until it's in writing and there is no way to tell from the record when the union received notice in writing.

The Court has looked at the cases. The Court asked yesterday about the *Dowty* case, Sixth Circuit case. It

would seem to me that the union could say it didn't have notice until it received formal notice.

Let's assume there wasn't any formal notice given in writing. The Court is persuaded by the Sixth Circuit case in which the Court said we're not persuaded by plaintiff's [473] argument that he cannot be deemed to have knowledge until he receives formal notice of the arbitrator's award.

That decision and award was made on November 18 and everyone was advised of that award on the 18th. The plaintiff says that this should be treated like a court's judgment. These proceedings are not court judgments. They don't refer to journal entries in these proceedings, therefore, based upon that the Court will grant the defendants' motion and award judgment for the defendants based upon the Statute of Limitation in this case. So ordered. * * *

[Filed Aug. 7, 1998]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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96-3623/3624/3683

DENNIS W. SCHOONOVER
(96-3623),
*Plaintiff-Appellee,*

v.

CONSOLIDATED FREIGHTWAYS CORPORATION OF DELAWARE (96-3624) AND LOCAL 24, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA (96-3683),
*Defendants-Appellants.*

---

BEFORE: MERRITT, KENNEDY, and BOGGS, Circuit Judges.

ORDER

The court having received two petitions for rehearing en banc, and the petitions having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petitions for rehearing have been referred to the original panel.

The panel has further reviewed the petitions for rehearing and concludes that the issues raised in the petitions were fully considered upon the original submission and decision of the cases. Accordingly, the petitions are de-

nied. Judge Kennedy would grant rehearing for the reasons stated in her dissent.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

Supreme Court, U.S.
FILED
JAN 19 1999
CLERK

Nos. 98-744 and 98-773

In the

# Supreme Court of the United States

October Term, 1998

Consolidated Freightways Corporation
of Delaware, Inc., and International
Brotherhood of Teamsters, Local 24,
*Petitioners,*

v.

Dennis W. Schoonover,
*Respondent.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

## MEMORANDUM IN OPPOSITION

WILLIAM T. WHITAKER
*Counsel of Record*
ROWLANDS CO. LPA
190 North Union St.
Suite 301
Akron, Ohio 44304
(330) 762-0287

SIDNEY N. FREEMAN
MCNAMARA & FREEMAN
CO LPA
12370 Cleveland Avenue, N.W.
P.O. Box 867
Uniontown, Ohio 44685
(330) 699-6703

Counsel for Respondent

January 19, 1999

## QUESTIONS PRESENTED

1. Did the Court of Appeals apply the proper rule of law in reviewing the verdict of a jury that was properly instructed that the standard of liability for breach of the duty of fair representation was whether the union's conduct was arbitrary, discriminatory or in bad faith, and whether the breach tainted the outcome of the arbitration proceeding?

2. Does the statute of limitations for a hybrid suit for breach of fair representation and violation of the collective bargaining agreement begin to run before the arbitral body issues its decision, as soon as it states what the result of the hearing is going to be?

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## MEMORANDUM IN OPPOSITION

Petitioners here seek review of an appellate decision that upheld the verdict of a properly instructed jury that found petitioners liable for breach of the duty of fair representation {"DFR") and breach of contract, respectively. Petitioners do not take issue with the jury instructions, and they did not take issue with them below. Thus, the court of appeals properly framed the issue: "This is a fact-intensive case in which the applicable legal standards are well settled." Pet. App. 2a. The court below recognized the single issue presented and noted that Petitioner's "challenge the sufficiency of the evidence supporting" the jury's verdict, Pet.App.2a., in which the only issue is whether "the evidence against Schoonover was so overwhelming that no one could reasonably find in his favor." Id. 4a.

Rather than taking issue with the standard of law applied pursuant to the jury instructions, petitioners attack the opinion below because of the use of the word "could" by the Sixth Circuit. In fact, however, the Court was simply pointing out what a reasonable jury could have properly concluded in light of the correct viewing of the factual record. That is, a jury could properly have found facts amounting to a breach under well-settled standards of law. Each and every passage in the court of appeals' opinion that petitioners' cite as supposedly being in conflict with the decisions of other courts of appeals did not in fact cite some controversial legal standard, but simply indicated that the jury could have relied on a particular fact, among others, and could properly have come to a particular conclusion, in finding a breach of DFR or contract. Thus, the questions on which petitioners ask the Court to grant certiorari simply are not presented here.

In order to see why this is so, we begin by recounting the facts, not in the light most favorable to the union and

employer as the petitions do, but as they were presented to the jury, on which their verdict was based. We then show how the court of appeals analyzed the record and the jury verdict, and why it affirmed. Finally, we demonstrate, in light of this Statement, that the questions are not properly presented, that the supposed conflict among the circuits does not exist, and that certiorari should, consequently, be denied.

## STATEMENT

### A. Facts

Respondent Dennis Schoonover was employed by Consolidated Freightways ("CF"), the petitioner in No. 98-773. from 1970 until his was discharged in 1987. As recounted by the court of appeals, the circumstances of respondent's discharge were as follows:

> [Respondent] was a truck driver for [Petitioner]. He was discharged for intentionally destroying company property, specifically a brake pedal of the tractor he was driving to Milwaukee. On the day in question, the pedal broke off within twenty-five minutes of [Respondent's] departure from the terminal. [Petitioner] claimed that [Respondent] broke the pedal in retaliation against his supervisors for making him drive a "piece of junk." His supervisor believed that he had use a long tire iron (or "bud bar") to pry the pedal off so that he could drive a different rig to Milwaukee. They reached this conclusion by prying the pedal off another tractor in this manner. [Respondent], of the other hand, vehemently denied breaking the pedal. According to him, when he went to put on the brakes at the first major intersection on his route, the pedal

> was lying on the floorboard in two pieces. This story was corroborated by another truck driver who saw [Respondent] perform an emergency stop at this intersection, which would be consistent with a normal brake failure. [Respondent] speculated that the brake tie-down mechanism, which holds the pedal down while the driver checks the brake system, could have caused the pedal to break. Purportedly, the tie-down could have lodged under the pedal, causing it to snap off when a driver depressed the brake, or it may have caused cracks in the die-cast metal by repeatedly allowing the pedal to snap back into place after a drive disengaged it.
>
> Petition for Writ of Certiorari, Appendix A, 2a-3a.

Respondent filed a grievance over his discharge with his collective bargaining representative, Teamsters Local 24, which is the petitioner in No. 98-744. In order to dissuade Local 24 from pursuing respondent's grievance, CF gave Local 24 the report of an expert that purported to support the discharge, and conducted a demonstration that purported to show how respondent must have intentionally broken the pedal in order to hurt CF's business. At trial, however, respondent was able to demonstrate that the expert had been asked only to give an opinion about whether the pedal was broken by upward force which, the employer later argued, could have resulted from an alleged crow bar, but that the expert was steered away from conducting tests that he had suggested that could have demonstrated, among other things, weakness in the pedal, because that would have undercut the discharge; he also showed that the demonstration was phony. Respondent proved that CF was able to break the pedal only by installing **different** equipment than that which was on respondent's truck.

Additionally, a videotape obtained from CF in discovery showed that CF supervisors had tried for two straight hours to break the pedal in the way in which respondent was supposed to have done, but had been completely unable to do it, until they hit on the trick of using different equipment. Respondent also established at trial that the cost of fixing the brake pedal was only a few dollars, undercutting CF's theory that respondent broke it in order to get back at the company for some imagined slight.

As against petitioner Local 24, the theory of respondent's case was that the union simply accepted the employer's story and rejected respondent's story without much thought and without investigation, and then proceeded to do no more than go through the perfunctory motions in presenting respondent's case in arbitration. In this regard, it is important to note that this is **not** a case in which a union made a deliberate decision not to proceed with a grievance, and defends its decision in that regard on the basis of a reasoned analysis of the case. Rather, in this case the union took the case before a union-employer joint committee but did no more than permit the respondent to say he didn't do it and leave it to the committee to decide what to believe.

Reading the petitions, one would think that respondent's claim was simply that the union decided not to hire an expert to examine the accident and determine whether respondent could possibly not have been at fault. In fact, however, this was but one of numerous deficiencies in the union's handling of the grievance to which respondent pointed in arguing that the union pursued his grievance in a grudging, perfunctory fashion. Among these flaws were the following:

— the union did not even talk to CF's expert; had

it done so, even a telephone call would have revealed that CF directed its expert not to consider possible causes of the accident that would have exonerated respondent, even though he suggested such causes to CF;

-— the union made no effort to confirm the company's version of the facts by conducting its own demonstrations with the brake pedal; had it done so it would have learned that it was virtually impossible for the pedal to have broken in the way that CF had accused respondent of doing;

— the union made no demand on CF for relevant materials, as it had the power to do;

-— the union allowed the employer to use a brake pedal from a different kind of truck as a model at the hearing;

— the union made no effort to determine the accuracy of the company's claim that the truck's manufacturer had no reports of similar fractures; had it done so it would have learned that the manufacturer doesn't keep records in a manner that shows whether brake pedals fractured, but that a more general category of "brake replacements" had numerous entries, without showing the reasons for the replacement;

— the union did not consider or present evidence about problems caused by the specific variant of brake pedal used on respondent's truck, even though the truck which was from a different manufacturer than most of CF's trucks, and the pedal type and accompanying equipment were different that most of that manufacturer's trucks;

-— the union did not talk to or present evidence from other drivers identified by respondent who knew that similar pedals owned by the company unintentionally fractured in the same manner as Schoonover's; these drivers' trial testimony was devastating to the company's claim of

just cause for the discharge;

— the union did not investigate structural defects in the actual broken pedal;

— the union did not investigate or question the effect of a tie down mechanism used exclusively by CF and which their own expert testified could have been a cause of the break in Schoonover's pedal;

— and numerous other errors, the discussion of which consumed 14 pages in respondent's brief in the court of appeals (a copy has been lodged with the Clerk).

The grievance was presented to a joint union-employer committee on November 18, 1987. The employer's representative presented numerous documents, laboratory reports, and statements from employees and other witnesses, and conducted a demonstration using a "mock-up" brake pedal (from a different truck manufacturer, as noted above but ignored at the arbitration). The union's case consisted of reading statements from respondent and the miswritten statement of another driver, oral statements by respondent, plus the complaint that the company's expert testimony should be disregarded because the union did not have any experts. After a short recess, the chairman of the committee indicated that the committee was not going to grant the grievance, and that an official notification would be sent to the parties reciting the committee's findings. Indeed, the committee's rules specifically provide that decisions must be issued in writing. On November 24, 1987, respondent learned from petitioner Local 24 that this official denial of the grievance had been issued.

**B. Proceedings Below.**

Respondent filed his complaint in the United States District Court for the Northern District of Ohio on May 20,

1988, which was more than six months after November 18, 1987, but less than six months after November 24, 1987. At the conclusion of respondent's case at his first trial in December 1992, the district court dismissed the action as untimely, applying the six-month statute of limitations adopted by this Court in *DelCostello v. Teamsters*, 462 U.S. 151 (1983).

Respondent appealed, contending that, just as he could not have filed his hybrid claim before receiving a copy of the joint committee decision rejecting his grievance, so did the statute of limitations not begin to run until that time. The court of appeals agreed, in a unanimous opinion authored by Circuit Judge Boggs. It began by noting the unanimity among the circuits in holding that a cause of action accrues when suit could first have been maintained, and that a plaintiff cannot bring a hybrid suit until both of the following have occurred — the arbitration decision has been issued, and the plaintiff learns (or should have learned) of the decision. CF Pet. App. 15a-16a. The question, therefore, is whether an oral indication of the intended decision is the "decision" for statute of limitations purposes, or whether the decision is not issued until it is written. Looking both to the rules of the Teamster joint committee in question, and the Ohio arbitration statute, which is based on the Uniform Arbitration Act, the court concluded that to be official an arbitration award must be in writing. *Id.* *17a-18a.* Moreover, given the need for a written record of the basis for decision, in order to be able to litigate a DFR case (or any other case challenging an arbitral determination), the court concluded that the only correct approach was to expect litigants to wait for the written decision before coming to court. *Id.* 18a-19a. Accordingly, respondent had properly sued within six months of the written decision, and the timeliness dismissal was reversed.

Rather than seeking review of this decision, petitioners

returned to the district court and the case proceeded to trial. With respect to the DFR, the jury was instructed that it could find a breach only if petitioner Local 24's "conduct in representing Schoonover was arbitrary, discriminatory or in bad faith." The court specifically instructed that "simple negligence by the Union or errors in judgment" were not sufficient to breach the DFR, but that arbitrary conduct could be found "if . . . the union's behavior is so far outside a wide range of reasonableness as to be irrational," or if "a union handles a grievance in a perfunctory manner with caprice or without rational explanation." The instructions further directed that liability could be found only if petitioner Local 24's failure to fairly represent "was of such a character as to have had the probable result of causing an erroneous outcome at the arbitration stage," or, in other words, that "the Union's breach of its [DFR] tainted and undermined the arbitration process; thereby foreclosing the Plaintiff from a fair consideration of his grievance by the arbitrators." In other words, the trial judge instructed, respondent "must demonstrate by a preponderance of the evidence that the Union's breach was so significant that the grievance process was seriously flawed and the arbitration decision tainted, such that a different result would have been rendered but for the Union's arbitrary, discriminatory or bad faith actions." Thus, indisputably correctly, instructed, the jury rendered a verdict for respondent.

Petitioners then appealed. The appellate briefs, on both sides, were devoted largely to an analysis of the record, with petitioners, presenting the facts in a light most favorable to the petitioners just as they do in their petitions in this Court, contending that there was not sufficient evidence in the record to sustain the verdict on the questions of whether the union had breached its DFR and whether the union's breach had tainted the outcome of the joint committee's deliberations, and

respondent arguing just as forcefully that there was ample evidence to support the verdict in both respects. Petitioners did not contend below that the trial court had committed any error of law or given any faulty jury instructions, apart from its failure to appreciate that there simply wasn't enough evidence to sustain the verdict. Their questions presented were all directed to the question of whether the record was adequate to sustain the verdict.

In an opinion by Circuit Judge Merritt, joined by Circuit Judge Boggs, The court of appeals upheld the verdict in all respects. Like the parties, the court below did not treat the case as one presenting difficult of controversial questions of law; instead, it said, the petitioners "challenge the sufficiency of the evidence supporting" the jury's verdict, Pet App. 2a, in which the only issue was whether "the evidence against Schoonover was so overwhelming that no one could reasonably find in his favor." *Id.* 4a. In order to decide that question, it recounted the various forms of evidence that Schoonover had presented to show "that his supervisors . . . set him up and then fabricated evidence to assure his dismissal," *id.* 4a-5a, and "that the union never took his grievance seriously and thus provided him inadequate representation at his grievance committee hearing." *Id.* 5a-6a. The jury's findings by special verdict that petitioner CF has breached its contract, that petitioner Local had breached its DFR, and that this breach "tainted the hearing in such a way that the arbitration committee would have reached a different result without the breach, . . . specifically trace the requirements for liability in a hybrid 301 case." *Id.* 6a.

The court then concluded that the evidence was sufficient to support findings on each of these questions. The court recounted several failings by petitioner union which, cumulatively, "would justify the jury's finding that the union's

representation of Schoonover was 'arbitrary, discriminatory, perfunctory, or in bad faith," and that without these failings, "it is certainly conceivable that the grievance committee would have **decided** Schoonover's grievance differently." *Id.* 7a. Given the high standard for overturning a jury verdict, these conclusions required affirmance.

Judge Kennedy dissented, but like the majority she treated the case as a factual one and not a legal one. She did not accuse the majority of committing any errors of law, not to speak of departing from the precedents of other circuits or of this court. She simply concluded that there was not sufficient evidence in the record to sustain the verdict.

Petitioners then sought rehearing and rehearing en banc, but no judge requested a vote on en banc consideration.

## REASONS FOR DENYING THE WRIT

### The Decision Below Does Not Conflict With Any Decision of This Court or Any Other Circuit, and Indeed the Passages That Allegedly Reflect Legal Error Are Simply Taken out of the Context of Finding No Error in a Jury Verdict

Between them, the two petitioners ask the Court to grant certiorari in this case on three separate questions of law that are said to be presented here. Both petitioners contend that the Sixth Circuit applied the wrong standard of union culpability for the finding a DFR breach, charging that the court below accepted a "negligence" or "legal malpractice" standard. In addition, the union petitioner charges the court with allowing a finding of liability based only on a mere **possibility** that the DFR breach tainted the arbitral outcome, and the employer petitioner

contends that the suit was untimely because it was brought less than six months after the written decision but more than six months after the oral announcement of which the decision would be.

As we explain below, of these three questions, only the latter is genuinely presented. The court did not apply a negligence standard, but upheld the verdict based on the perfunctory processing of the grievance (that is, that the union was only going through the motions), and it did not uphold a standard of "possible taint" but simply said that the evidence was enough that taint could have been found. In short, the offending lines on which petitioners seize are simply taken out of context. The legal questions that petitioners' able counsel endeavor to create out of a substantial evidence appeal simply are not presented here. The limitations question is here, but the holding below is not in conflict with other lower court holdings or with any decision of this Court, and indeed, it is undoubtedly correct and thus not worthy of a grant of certiorari.

1. Both petitioners contend that the court below held the union to a standard of simple negligence as a sufficient basis for finding a breach of the DFR. That is simply not what happened below. The Sixth Circuit at no time mentions the word negligence or in any way suggests a negligence standard should be used. To the contrary, the Court relied on the the correct standard for the union breach as the DFR, traditionally followed in the Sixth circuit and elsewhere, which is whether the representation "was 'arbitrary, discriminatory, perfunctory, or in bad faith.' *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1355 (6th Circuit 1989); See also *Vaca v. Sipes*, 386 U.S. 171, 190, (1967)." Pet. App. 7a. The jury in this case was properly instructed on the "arbitrary, discriminatory or bad faith" standard enunciated by this Court in many cases beginning with

*Vaca v. Sipes*, 386 U.S. 171 (1967). The instructions included two explanations of the "arbitrary" portion of the standard -- (1) that "arbitrary" could include merely "perfunctory" grievance handling that amounts to merely going through the motions of processing the grievance without ever taking the matter seriously, *Vaca, supra*, 386 U.S. at 190, 191, and (2) that conduct so far beyond the bounds of reasonableness as to be irrational is arbitrary. *ALPA v. O'Neill*, 499 U.S. 65 (1991).

Each of the two petitioners relies on a different part of the court of appeals' decision to show that it relied on a negligence standard. Petitioner CF relies solely on the dissent for the proposition that a negligence standard was applied below. Thus, in the argument portion of its brief, this petitioner states, "The dissent . . . fairly stated the facts and rationally analyzed the evidence in concluding that, at the very most, Local 24's conduct was negligent." CF Pet. 13. But the majority did not invoke a negligence standard, and even Judge Kennedy did not accuse the majority of invoking such a standard; she simply expressed her opinion that the evidence was sufficient only to support a finding of negligence and that this was not legally sufficient. Absent reliance by the majority on a negligence or malpractice standard, certiorari should not be granted to decide whether that is the proper standard simply because one of the three judges below thought that that was all the evidence showed.[1]

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[1] At pages 14-15, of its petition, CF also takes the court below to task for using the wrong standard for deciding whether there was enough evidence to support the jury's verdict. Petitioner advances the curious proposition that "the standard for review of a jury verdict is de novo," which it contends that the Sixth Circuit has used in other cases. We do not believe that

Petitioner Local 24, for its part, seizes on the use of the word "mistakes" in the majority opinion to show that the majority "applied what amounts to a legal malpractice standard of negligence," Pet. 7, and then argues that the decision below conflicts with *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1986), which squarely rejects the legal malpractice standard. Pet. 8. But the words "malpractice" and "negligence" do not appear in the majority opinion, and, indeed, the jury was instructed that mere negligence or errors of judgment were not enough to warrant liability. The offending sentence on which the Local 24 petition relies is the following: "Without these mistakes, it is certainly conceivable that the grievance committee would have decided Schoonover's grievance differently." Pet. App. 7a. The preceding sentence, however, stated that Schoonover's challenges to the union's conduct "are all substantial reasons which, in combination, would justify the jury's finding that the union's representation of Schoonover was 'arbitrary, discriminatory, perfunctory or in bad faith." *Id.* After all, Schoonover's contention, as the majority properly understood it, was that instead of taking his grievance seriously, the local just went through the motions of representing him; that is what the majority found to be supported by the evidence in the record.

Moreover, perfunctory processing of a grievance is precisely what this Court in *Vaca* said a union cannot do. If the union thinks the grievance isn't worth pursuing, it should say so

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this is the Sixth Circuit standard. In any event, the question of the proper standard for review of a jury verdict was not presented to the court of appeals; it is not fairly included in the question presented; and thus it is no basis for a grant of certiorari in this case.

and then its decision stands or falls based on whether its evaluation is so far outside the bounds of reasonableness as to be irrational; but if it takes the case to arbitration, it cannot simply go through the motions. That is the standard on which the jury was instructed — without objection from the respondents — and the Court should not grant certiorari based on the proposition that the court below departed from that standard.

Petitioner Local 24 apparently raises as a separate question whether its "failure to retain an expert" can be "so wholly irrational" as to breach the DFR; according to the union, this is a merely tactical decision in the conduct of a grievance trial that should not be the basis for imposing liability. Pet. 9-10. But Local 24's non-use of an expert was simply one of several defects in its handling of the grievance that supported Schoonover's contention that petitioner was only going through the motions with respect to his grievance. Good lawyers that they are, petitioner's counsel seeks to hold each individual reason up to the light and ask rhetorically whether this reason alone can constitute a breach. But the issue is not whether this individual act breached the DFR, but whether the jury was entitled to find, based on a long series of acts of which this is only one, that petitioner was only going through the motions with respect to his grievance. Indeed the court below referred to the "combination" of "substantial reasons" which "justify the jury's finding." Pet. App. 7a. The court properly held that there was enough evidence to support this aspect of the special verdict, and the question of whether this individual failing breaches the DFR is simply not presented in this case.

2. Petitioner Local 24 also accuses the court below of allowing a jury to find it liable because a breach of the DFR "might have" affected the outcome of the arbitation, instead of

"rigorous proof that taint **actually occurred**." Pet. 11-12 (emphasis in original). Petitioner bases this accusation on the same sentence as its first point: "Without these mistakes, it is certainly conceivable that the grievance committee would have decided Schoonover's grievance differently." Pet. App. 7a. But in this sentence, the court of appeals was not invoking the standard for the jury's consideration of the issue of taint; it was invoking the deferential standard for its review of the jury's special verdict on the issue of taint. The jury was properly instructed that it had to find actual taint; once the jury so found, its verdict had to be upheld so long as there was evidence in the record sufficient to support a finding of taint. That is all the court below meant when it used the words "certainly conceivable," and this question forms no basis for certiorari here.

3. Finally, petitioner CF asks the Court to grant review to decide whether the statute of limitations in a hybrid case accrues when the arbitral body states orally what how it intends to decide the grievance, or only when it issues its written decision and the employee learns of that decision. Petitioner contends that other circuits have held contrary to the decision below, but it does not cite any case that is actually in conflict with the decision below, nor are we aware of any.

Thus, *Samples v. Ryder Truck Lines*, 755 F.2d 881, 887 n.7 (11th Cir. 1985), and *Dowty v. Pioneer World Elec. Co-op.*, 770 F.2d 52, 56 (6th Cir. 1985), the arbitration decisions had in fact been issued in writing. In *Dowty* the court held that the employee's suit was untimely because it was not filed within six months of the date when the written decision was read to him; although he had not received a copy, he knew it had been issued. In *Samples* the decision was favorable to him, but the suit was not filed within six months of the employee's learning

that the union was not going to seek enforcement of the award. The only reference to the time for suing to overturn an arbitration award was in a footnote explaining that the six months runs from the time when the employee learns of the "award" - that is, in context, of the written decision. And *Metz v. Tootsie Roll Industries*, 715 F.2d 299 (7th Cir. 1983), did not involve an arbitration decision at all — the union's breach there was in failing to take the grievance to arbitration, and the court held that the statute began to run when the member knew or should have known of that failing. Thus, petitioner has not cited a single decision of any lower court that conflicts with the decision below — indeed, the petition takes the court below to task for failing to cite any precedent on the issue. But in the absence of any conflict among the lower courts on this issue, there is no reason for the Court to grant review here.

Moreover, the decision below was plainly right. This is true in part because, as the court below noted, the rules of the Ohio Joint State Grievance Committee require decisions to be reduced to writing and signed by both sides. CF Pet. App. 17a. The Ohio arbitration statute, drawn as it is from the Uniform Arbitration Act, requires a written decision. If someone is to challenge an arbitral decision, surely it makes sense to wait to see what the decision says before coming to court, because the text of the decision may affect the viability of the legal challenge.

Petitioner CF seems to suggest that a member suing for breach of the DFR in an arbitration hearing could appeal to the federal courts before the written decision is issued, but that is entirely unlikely. It is as if a federal judge announced that he was going to grant summary judgment for one side or the other, and the losing side filed its notice of appeal before the written summary judgment was issued. Just as the time to appeal does

not begin to run until the written judgment is issued, so the time to sue over breach of the DFR in a grievance proceeding leading to arbitration does not begin to run until the written arbitration decision is issued and member learns of its issuance. The decision of the court below on this point is wholly noncontroversial and not a good reason to grant review.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

William T. Whitaker
*Counsel of Record*
Whitaker & Rowlands Co., LPA
190 North Union Street Suite 301
Akron, Ohio 44304
(330) 762-0287

Sidney N. Freeman
McNamara & Freeman CO, LPA
12370 Cleveland Avenue, N.W.
P.O. Box 867
Uniontown, Ohio 44685
(330) 699-6703

Counsel for Respondent

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